Filed 3/10/20 P. v. Quintero CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL QUINTERO,

Defendant and Appellant.

F075807

(Tulare Super. Ct. No. VCF255016C)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Miguel Angel Quintero and two codefendants, Jesus Castillo and Roberto Estrada, were charged with several crimes in connection with a robbery and shooting at an ATM. The information charged defendant with attempted murder (count

SEE CONCURRING OPINION

1; Pen. Code, §§ 664, 187, subd. (a)),[1] carjacking (count 2; § 215, subd. (a)), first degree robbery (count 3; § 211),[2] assault with a firearm (count 4; § 245, subd. (a)(2)), and assault with a deadly weapon (i.e., a knife) (count 5; § 245, subd. (a)(1).)[3] The information also alleged that all five crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(A)–(C).) Finally, the information alleged that with respect to counts 1, 2, and 3, a principal (i.e., Jesus Castillo) intentionally discharged a firearm proximately causing great bodily injury[4] to the victim, Jeffrey Gould (referred to in the complaint as "J.G.")[5] (§ 12022.53, subds. (c)–(e)(1).)

Defendant was tried separately from his two codefendants. The jury convicted defendant of attempted murder, first degree robbery, assault with a firearm, and assault with a deadly weapon; and found the related enhancements to be true. The jury acquitted defendant of carjacking.

On count 1, defendant was sentenced to life with the possibility of parole, plus 25 years to life (§ 12022.53, subd. (d)). On count 3, defendant was sentenced to a concurrent term of four years, plus 25 years to life (§ 12022.53, subd. (d)). On count 4, defendant was sentenced to a term of three years, plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C).). On count 5, defendant was sentenced to a term of three years, plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C).) Defendant's

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] See also section 212.5, subdivision (b).

[3] A sixth count charged Roberto Estrada with evasion of an officer. (Veh. Code, § 2800.2, subd. (a).)

[4] The information says, "[G]reat bodily injury and death."

[5] Several additional enhancements were alleged with respect to the other defendants.

sentences on counts 4 and 5 were stayed pursuant to section 654. Restitution and several other fines and fees were also imposed.

Defendant appealed. In *People v. Quintero* (Oct. 26, 2016, F069749) [nonpub. opn.] (*Quintero I*), this court agreed with defendant's contentions that there was insufficient evidence he knew the two principals were gang members, and that his sentence for robbery should have been stayed under section 654. Accordingly, our opinion had the following disposition:

> "The true findings on the section 186.22, subdivision (b) enhancements and section 12022.53, subdivision (e)(1) enhancements are reversed. The matter is remanded to the trial court for resentencing with directions to stay execution of the sentence on count 3 pursuant to section 654. When a new abstract of judgment is prepared after resentencing, it shall note that defendant was convicted by 'jury' not by 'plea.' The new abstract of judgment shall also reflect that execution of sentence on count 4 was stayed pursuant to section 654. In all other respects the judgment is affirmed." (*Quintero I*, *supra*, at p. 18.)

Pursuant to this disposition, the trial court resentenced defendant on April 19, 2017. The court imposed the following sentence: life with the possibility of parole on count 1; a stayed (§ 654) term of four years on count 3; a stayed (*ibid.*) term of three years on count 4; and a stayed (*ibid.*) term of three years on count 5.

Defendant now appeals again. However, his appellate challenge takes aim not at the resentencing on remand, but at his original trial. Specifically, he alleges the court made an instructional error. We conclude that defendant is precluded from pursuing "successive appeals based on issues ripe for consideration in the prior appeal and not brought in that proceeding. [Citations.]" (*People v. Jordan* (2018) 21 Cal.App.5th 1136, 1143.) Therefore, we find his claim of instructional error forfeited.

In supplemental briefing, defendant cites Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill No. 1437) as grounds for reversing his attempted murder conviction. In *People v. Larios* (2019) 42 Cal.App.5th 956, review granted February 26, 2020,

S259983 (*Larios*), we held that Senate Bill No. 1437 abrogated the natural and probable consequences doctrine not only as to murder, but as to attempted murder as well. (*Larios*, *supra*, at p. 968.)

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), ameliorative statutes that are silent on the issue of retroactivity are presumed to apply retroactively to judgments of conviction that are not yet final. In *People v. McKenzie* (Feb. 27, 2020, S251333) __ Cal.5th __ [2020 Cal. LEXIS 1220] (*McKenzie*), the Supreme Court held the "judgment of conviction" in this context includes the sentence. Because defendant's sentence is not yet final, there is no final judgment of conviction as to attempted murder for *Estrada* purposes. Therefore, Senate Bill No. 1437 applies retroactively to defendant's conviction.

Accordingly, we reverse defendant's attempted murder conviction.[6]

FACTS[7]

At about 5:00 a.m., on July 12, 2011, Jeffrey Gould (Gould) pulled up to an ATM in Exeter. He exited his Mazda and approached the ATM, having left the car running and its door open. He withdrew $700 for rent. Gould's mother, with whom he lived, called and told him to withdraw another $220. However, the ATM indicated the account had insufficient funds for the additional $220.

There was an older man behind him, so Gould let him use the ATM. As the man used the ATM, Gould went to his car and continued to speak with his mother on the phone. After the man was done using the ATM, Gould again attempted to withdraw additional funds but could not due to insufficient funds. The ATM printed a receipt,

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[6] Because Senate Bill No. 1437 did not invalidate all theories of attempted murder liability, the People may elect to retry the count on remand, if appropriate. The People may not try defendant on any theory precluded by the changes made by Senate Bill No. 1437.

[7] Both parties rely on the statement of facts from this court's opinion in *Quintero I*. We do the same.

which fell to the ground. Gould picked it up and looked at it. That is when two men came up to him. One of the men was wearing a hat and holding a knife with a blade about four inches in length. The knife-wielding assailant said, " 'Give me your shit, Holmes.' " Gould replied, " 'F**k you.' " The knife-wielding assailant then hit Gould with his hand. The two "scuffled around" until the other assailant shot Gould. The bullet broke two of Gould's ribs, injured his lung and necessitated removal of his spleen.

Defendant eventually admitted to law enforcement that he dropped off his cousin Jesus Castillo and his friend "Huesitos" at the bank parking lot near 5:00 a.m. Castillo and Huesitos got out and were running "kind of towards the bank." Defendant knew Castillo and Huesitos were going to rob someone but did not know they would shoot anyone. Defendant waited down the road. When Castillo and Huesitos returned, they said they had shot the victim because he was bigger than they were, and he was "coming at them."

DISCUSSION

I. Defendant Forfeited any Challenge to Instructional Error that Could Have Been Raised in his Prior Appeal

Defendant argues the court erred in failing to instruct the jury that, in order to convict of premeditated attempted murder, it must find that premeditated attempted murder was a natural and probable consequence of the target offense of robbery. Defendant acknowledges that the Supreme Court has held that juries need not "be instructed "that a premeditated attempted murder must have been a natural and probable consequence of the target offense." (See *People v. Favor* (2012) 54 Cal.4th 868, 872.) He further concedes that *Favor* "is directly on point" to the issue he raises, and that we are "normally … compelled" to follow Supreme Court precedent. However, defendant points to the Supreme Court's grant of review in *People v. Mateo* (Feb. 10, 2016,

B258333), review granted May 11, 2016, S232674. In a statement of the issues relating to the *Mateo* case on the Supreme Court's website,[8] the following question is posed:

> " 'In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) [570 U.S. 99 [113 S.Ct. 2151, 186 L.Ed.2d 314]] and *People v. Chiu* (2014) 59 Cal.4th 155?' "

Consequently, defendant argues that *Alleyne* and *Chiu* "cast doubt" on *Favor*, and he therefore raises the issue because the California Supreme Court "may decide *Mateo* and overrule *Favor* before this court issues an opinion in the present case …." Defendant goes on to explain how he believes *Alleyne* and *Chiu* undermine the reasoning of *Favor*.

However, after initial briefing was completed in this case, it became clear the Supreme Court was not going to issue an opinion in *Mateo*. After the Supreme Court had granted review, the Governor signed Senate Bill No. 1437 into law on September 30, 2018. That law is discussed in further detail below. In March 2019, the Supreme Court transferred *Mateo* back to the Second District Court of Appeal to reconsider its decision in light of Senate Bill No. 1437.[9]

In any event, we conclude defendant forfeited this challenge by failing to raise it in his prior appeal from the judgment of conviction.

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[8] The Supreme Court's issue statements are usually, if not always, followed by a notation to this effect: "The statement of the issues is intended simply to inform the public and the press of the general subject matter of the case. The description set out above does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court."

[9] As a result, *Favor* remains in effect and we are bound to follow it. (See generally *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) We do note that the Supreme Court has granted review in another case presenting the same issue. (See *People v. Lopez* (2019) 38 Cal.App.5th 1087, review granted Nov. 13, 2019, S258175.)

"Waiver precludes successive appeals based on issues ripe for consideration in the prior appeal and not brought in that proceeding. [Citations.]" (*People v. Jordan, supra,* 21 Cal.App.5th at p. 1143.)[10]

Alleyne was decided in 2013, and *Chiu* was decided in 2014. Briefing in defendant's prior appeal took place in 2015, and our opinion was not issued until October 2016. Defendant could have raised this instructional issue in the prior appeal but did not. Appellate challenges cannot be considered piecemeal "just because ' "the attorneys generate an idea they should have advanced by specification of error on the first appeal." ' [Citation.]" (*People v. Rosas* (2010) 191 Cal.App.4th 107, 116.) "The time for [defendants] to have raised this objection was during the first appeal." (*People v. Murphy* (2001) 88 Cal.App.4th 392, 397, fn. omitted.)[11]

II. Defendant Must be Given Benefits of Senate Bill No. 1437 Retroactively

A. Senate Bill No. 1437

Senate Bill No. 1437 became effective January 1, 2019. (*People v. Guitierrez-Salazar* (2019) 38 Cal.App.5th 411, 413.) "Senate Bill 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Substantively, Senate Bill No. 1437 accomplishes this by amending section 188, which defines malice, and section 189, which defines the degrees of murder, and as

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[10] We use the term "forfeiture" rather than "waiver" to describe this principle. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371 [forfeiture describes when a party loses a right by failing to assert it, while waiver describes intentional relinquishment of a known right].)

[11] Defendant argues we have discretion to permit the piecemeal prosecution of appeals. Even assuming that were the case, we decline to do so here.

now amended, addresses felony murder liability." (*People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

"Senate Bill 1437 … 'added a crucial limitation' to section 188, the statutory provision that defines malice …. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1099 …, review granted Nov. 13, 2019, S258175 (*Lopez*).) As amended, section 188 provides in pertinent part as follows: 'Except as stated in subdivision (e) of [s]ection 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.' (*Id.*, subd. (a)(3).)" (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 260.)

Senate Bill No. 1437 also created a procedure for certain murder convicts to petition to vacate their murder conviction and be resentenced. (See § 1170.95.) One of the requirements for such a petition is that the petitioner would not have been convicted under the new law of malice established by Senate Bill No. 1437. (See § 1170.95, subd.(a)(3).)[12]

In *Larios, supra*, 42 Cal.App.5th 956, this court held that Senate Bill No. 1437's change to section 188 – providing that malice shall not be imputed based solely on a person's participation in a crime – also applies to attempted murder. As a result, we held that "Senate Bill 1437's abrogation of the natural and probable consequences doctrine …necessarily applies to attempted murder." (*Larios, supra,* at p. 968.)

a. Retroactivity and Finality

Defendant was convicted in 2014. Senate Bill No. 1437 became effective in 2019. We must determine whether the changes Senate Bill No. 1437 made to the law of attempted murder apply retroactively to defendant's conviction of that crime.

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[12] Defendant argued he was entitled to relief under this provision. !(Deft 1st Supp Brief – filed 6-5-2019)! Subsequently, this court decided *Larios* which precludes that argument. (See *Larios, supra,* 42 Cal.App.5th at pp. 968–970.)

"Whether a statute operates prospectively or retroactively is, at least in the first instance, a matter of legislative intent." (*People v. Brown* (2012) 54 Cal.4th 314, 319.) The Legislature has clearly expressed its intent that statutes in the Penal Code are not retroactive "unless *expressly* so declared." (§ 3, italics added.)

Despite the statutory requirement of an "express[]" declaration of retroactivity, our Supreme Court held in *Estrada, supra*, 63 Cal.2d 740 that intent to apply a statute retroactively can sometimes be *inferred*. The Supreme Court reasoned that when the Legislature passes an ameliorative criminal statute, it must have determined the former law was too severe. As a result, "[i]t is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which is constitutionally could apply." (*Id.* at p. 745.) And an ameliorative criminal statute can be constitutionally applied to acts before its passage "provided the judgment convicting the defendant of the act is not final." (*Ibid*.) Therefore, when an ameliorative criminal statute is silent on the issue of retroactivity,[13] courts presume the Legislature intended for the statute to apply retroactively to all nonfinal judgments. This is known as the *Estrada* rule.

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[13] The Attorney General argues Senate Bill No. 1437 is not silent on the issue of retroactivity. !(AG 1st Supp Brief at pp. 12-13)! To the contrary, section 1170.95 sets out a detailed procedure for retroactively obtaining the benefits of Senate Bill No. 1437's substantive changes to the law. (See § 1170.95, subd. (a)(3).) Thus, it could be said that Senate Bill No. 1437 – like Proposition 47 – "address[es] the question of retrospective application in conspicuous detail." (*People v. DeHoyos* (2018) 4 Cal.5th 594, 601; see also *People v. Conley* (2016) 63 Cal.4th 646.)

Several courts of appeal have agreed with the type of argument made by the Attorney General with respect to Senate Bill No. 1437. (See *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147–1158; *People v. Martinez*, *supra*, 31 Cal.App.5th at pp. 724–729.)

However, we held otherwise in *People v. Medrano* (2019) 42 Cal.App.5th 1001, a case decided after the People filed their respondent's brief. We will follow that precedent here. (*Id*. at pp. 1018–1019.)

In setting the outer bound of inferred retroactivity at finality, *Estrada* overruled *People v. Harmon* (1960) 54 Cal.2d 9. *Harmon* had held that the relevant comparison was the effective date of the new statute versus the date of the actual commission of the crime. Conversely, *Estrada* held that the relevant comparison was the new statute's effective date versus the date the judgment of conviction became final. "The key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*Estrada, supra,* 63 Cal.2d at p. 744.) As this holding makes clear, the *Estrada* rule "does not apply" to final judgments. (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465; see also *People v. Buycks* (2018) 5 Cal.5th 857, 871–872.)

In the intervening decades, the Supreme Court has acknowledged "the continuing viability of the *Estrada* rule" while emphasizing its "narrowness" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1196, disapproved on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216) and noting its "limited" nature. (*People v. Foster* (2019) 7 Cal.5th 1202, 1210; *People v. Valenzuela* (2019) 7 Cal.5th 415, 428.) Moreover, the Supreme Court has since declined to follow certain language in *Estrada* concerning section 3, because when read "broadly and literally," it "endanger[s] the default rule of prospective operation." (*People v. Brown, supra,* 54 Cal.4th at p. 324.) "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments. [Citation.]" (*Ibid.*)

b. Applying the Estrada *Rule*

Under *Estrada*, the question is whether defendant's judgment of conviction of attempted murder became final before or after Senate Bill No. 1437's effective date. If

the conviction became final before Senate Bill No. 1437's effective date, then *Estrada* "does not apply." (*Smith, supra,* 234 Cal.App.4th at p. 1465.)

We begin with several undisputed premises. Neither party denies that defendant's sentence is not final, given that the present appeal was taken from resentencing. Nor is there disagreement that defendant was convicted of attempted murder in 2014, and the conviction was affirmed in 2016, well before Senate Bill No. 1437's effective date of January 1, 2019. The dispute is whether the lack of finality as to defendant's *sentence* necessarily precludes finality as to his attempted murder *conviction*. If so, his judgment of conviction for attempted murder is not yet final. If not, then defendant's judgment of conviction for attempted murder became final in the months that followed its affirmance in *Quintero I* – well before Senate Bill No. 1437's effective date of January 1, 2019.

After briefing was completed in this case, the Supreme Court issued its decision in *McKenzie, supra,* __ Cal.5th __ [2020 Cal. LEXIS 1220]. While *McKenzie* involved a different factual situation from the one presented here, its discussion of finality and judgments of conviction in the context of the *Estrada* rule resolves the question presented here in defendant's favor.

In *McKenzie*, the question was "whether a convicted defendant who is placed on probation after imposition of sentence is suspended, and who does not timely appeal from the order granting probation, may take advantage of ameliorative statutory amendments that take effect during a later appeal from a judgment revoking probation and imposing sentence." (*People v. McKenzie*, *supra,* __ Cal.5th __ [2020 Cal. LEXIS *1].) In answering that question, the high court defined "judgment of conviction" under *Estrada* in a way that is dispositive of the issue raised in the present case:

> "[T]he People err by assuming that when we used the phrase 'judgment of conviction' in *Estrada*, *supra,* 63 Cal.2d at page 744, we were referring only to 'underlying' convictions and enhancement findings, exclusive of sentence. In criminal actions, the terms 'judgment' and 'sentence' are generally considered 'synonymous' (*People v. Spencer* (1969) 71 Cal.2d

> 933, 935, fn. 1 …), and there is no 'judgment of conviction' without a sentence (*In re Phillips* (1941) 17 Cal.2d 55, 58 …)." (*McKenzie, supra,* at pp. *8–9.)

Given the Supreme Court's view that a "judgment of conviction" under *Estrada* means the "judgment of conviction" *and the sentence*, we must conclude that there is no final "judgment of conviction" yet in the present case. Therefore, defendant is entitled to the retroactive benefit of Senate Bill No. 1437 under *Estrada*.

DISPOSITION

Defendant's conviction for attempted premeditated murder is reversed. The People may elect to retry defendant on the attempted murder count on any theory permitted under the changes made by Senate Bill No. 1437. If the People elect to retry the attempted murder count, they shall notify defendant of that fact within 30 days of the filing of the remittitur and proceed with the prosecution in the time permitted by law. If the People do not elect to retry the attempted murder count, defendant shall be resentenced. In all other respects, the judgment is affirmed.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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PEÑA, J.

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MEEHAN, J.

Acting P.J., Poochigian, concurring,

Under *Estrada*, the "key date is the date of final judgment. If the amendatory statute lessening punishment becomes effective prior to *the date the judgment of conviction becomes final* then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies." (*In re Estrada* (1965) 63 Cal.2d 740, 744, italics added.) The Supreme Court has now held that "judgment" and "sentence" are generally synonymous and, for *Estrada* purposes, "there is no "judgment of conviction" without a sentence." (*People v. McKenzie* (Feb. 27, 2020, S251333) __ Cal.5th __ [2020 Cal. LEXIS 1220].)

Prior to *McKenzie*, "judgment" and "sentence" were "often distinguished … by using "judgment" to refer to the adjudication of guilt, and "sentence" to refer to the penalty." (6 Witkin, Cal. Crim. Law (4th ed. 2019) Criminal Judgment, § 161.) The First District had concluded it is "more accurate to state that the judgment in a criminal action is a record of the adjudication of guilt and the determination of the penalty. [Citations.]" (*People v. Pineda* (1967) 253 Cal.App.2d 443, 451; see also Pen. Code, § 1207.)[1] One corollary to this principle, especially relevant here, was that "an appellate court has power and authority to open the penalty aspect of the judgment without affecting the finality of the adjudication of guilt." (*Pineda*, *supra*, at p. 451; see also *People v. Vaughn* (1973) 9 Cal.3d 321, 326, fn. 3, superseded by statute on other grounds as noted in *People v. Chadd* (1981) 28 Cal.3d 739, 749; *People v. Kemp* (1974) 10 Cal.3d 611, 614.) *McKenzie* approaches the issue of finality differently, at least with respect to *Estrada* retroactivity. We, of course, follow the Supreme Court's interpretation of the law in the present case.

With an increasing number of ameliorative statutes enacted in recent years, speculation and uncertainty as to the issue of retroactivity can have a significantly

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[1] All further statutory references are to the Penal Code unless otherwise stated.

adverse impact on the efficiency of our system of justice. Given this complicated and unpredictable area of law, it is preferable that the Legislature continue its recent trend of addressing retroactivity *expressly*. (See, e.g., §§ 1170.18, 1170.95, 1170.126; see also § 3.)

With these additional observations, I concur in the opinion of the court.

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POOCHIGIAN, Acting P.J.